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No. 86-2022

# In the Supreme Court of the United States

OCTOBER TERM, 1987

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

*v.*

INTERSTATE COMMERCE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

ROBERT S. BURK
*General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

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**MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

Petitioner contends that an entity that did not participate in a proceeding before the Interstate Commerce Commission (ICC) should, under 28 U.S.C. 2344, be deemed a "party aggrieved" by the ICC's decision if it is a member of an umbrella organization that did participate.

1. With certain exceptions that are not relevant here (see 28 U.S.C. 1336(b)), judicial review of final orders of the ICC is governed by the Hobbs Act, 28 U.S.C. (& Supp. III) 2341 *et seq.* Under Section 2344 of that Act, a "party aggrieved" by a final order of the ICC may, within 60 days after its entry, file a petition for judicial review in the appropriate court of appeals. See generally *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 5.

In the present case, petitioner sought judicial review of the ICC's order exempting the Chicago, Central & Pacific Railroad Co. (CCP) from various statutory requirements

governing entry into the railroad business. The exemption permitted CCP to acquire and operate a railroad line that was previously owned by the Illinois Central Gulf Railroad Company. Pet. App. 2a, 7a.[1]

In the ICC proceedings, the exemption request was opposed by a competing carrier and its shipper associations and by various labor interests, including the Railway Labor Executives' Association (RLEA) (Pet. App. 8a). RLEA, a voluntary association composed of the chief executive officers of 19 labor organizations, including petitioner, argued that regardless of whether the exemption request was granted, the transaction should be subject to labor protective conditions. The ICC rejected that contention and granted the exemption with no labor conditions (Pet. App. 24a-26a, 27a-28a).

2. Petitioner, whose president is a member of RLEA, did not participate in the ICC proceedings. Nonetheless, after the ICC issued its decision, petitioner filed a petition for review in the Eighth Circuit. The court of appeals dismissed the petition on the ground that petitioner lacked standing to challenge the ICC's decision (Pet. App. 2a-5a). Specifically, relying on *Simmons* v. *ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983), *American Trucking Ass'ns* v. *ICC*, 673

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[1] CCP was a newly formed corporation that owned no other rail property (see Pet. App. 8a). In general, entities that seek to acquire and operate rail properties are required to obtain prior ICC approval. 49 U.S.C. 10901. Under Section 10901, the ICC is directed to grant an application if it finds that "the present or future public convenience and necessity require or permit" the transaction. Instead of filing an application under Section 10901, however, CCP filed a petition for exemption under 49 U.S.C. 10505, which requires the ICC to grant an exemption from regulation under Section 10901 if it finds that (1) such regulation is not necessary to carry out the rail transportation policy of the Interstate Commerce Act and (2) either (A) the transaction is of limited scope or (B) regulation is not needed to protect shippers from abuse of market power.

F.2d 82, 84 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983), and *ACLU* v. *FCC*, 774 F.2d 24 (1st Cir. 1985), the court held that petitioner was not a "party aggrieved" by the ICC's decision because it did not participate at the administrative level (Pet. App. 3a-5a). The court pointed out (*id.* at 5a) that petitioner "could have participated in the proceedings before the ICC, thereby insuring that its interest would receive judicial review." It concluded that even though RLEA chose not to seek judicial review, and even though petitioner was statutorily barred from seeking such review on its own because it was not a "party" to the ICC proceedings, there was "no compelling reason to ignore congressional intent" in limiting judicial review to parties (*ibid.*).

3. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

a. Under 28 U.S.C. 2344, only a "party" aggrieved by a decision of the ICC is allowed to seek judicial review. Congress's choice of wording was clearly deliberate. For example, the judicial review provision of the Administrative Procedure Act (APA), 5 U.S.C. 702, provides for judicial review by any "person" aggrieved by agency action within the meaning of a relevant statute. Congress chose not to adopt the "person aggrieved" standard of the APA when enacting the Hobbs Act, even though the APA was passed only four years earlier. See *Simmons*, 716 F.2d at 43. Petitioner cites nothing in the legislative history to show that Congress intended to authorize petitions for judicial review under 28 U.S.C. 2344 by persons other than "part[ies]." See generally *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10 n.12 (citations omitted) (courts must follow plain language of a statute unless there is a " 'clearly expressed legislative intention' contrary to that language"). Indeed, because the statutory language of

the Hobbs Act is so clear, and because the legislative history is not to the contrary, the courts have repeatedly refused to permit nonparties to obtain judicial review under Section 2344. See, *e.g.*, *ACLU*, 774 F.2d at 25; *Simmons*, 716 F.2d at 42-45; *American Trucking Ass'ns*, 673 F.2d at 84.

In the present case, the court of appeals correctly dismissed petitioner's appeal. Even if petitioner was affected by the ICC's ruling, it was not a "party" aggrieved by that order. Petitioner had the opportunity to participate in the agency proceeding, but it chose not to do so, relying instead on its umbrella organization, RLEA, whose interests apparently were not identical to its own. The court properly held that participation in the agency proceeding by RLEA did not satisfy the "party aggrieved" requirement as to petitioner.

b. Even though the court of appeals merely followed the plain language of Section 2344 and an established body of case law, petitioner contends (Pet. 4) that the court's decision is erroneous. It cites several reasons for its claim, all of which lack merit.[2]

First, petitioner points out that employees have the right to participate before the ICC on their own or to be represented by their unions (Pet. 5 (citing cases)). That proposition is factually correct but legally irrelevant, since the right of rail employees to participate on their own or to be represented by their unions before the agency and the courts was in no way affected by the court of appeals' decision. Petitioner could have represented its employees as

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[2] Petitioner has apparently abandoned its argument below that judicial review is appropriate because the ICC's decision was beyond the scope of its authority. As the court of appeals noted (Pet. App. 5a), even if such an exception to Section 2344 existed, petitioner's "bald statement" that the ICC exceeded its jurisdiction would be "insufficient to bring [it] within this exception."

a party during the ICC proceeding and thereby obtained standing to seek judicial review. Likewise, RLEA, which did participate before the agency, could have sought judicial review but chose not to do so.[3]

Second, petitioner attempts to distinguish prior decisions under Section 2344 by noting that although it did not participate before the ICC, a *related* representative, *i.e.*, RLEA, did participate (Pet. 9). But those decisions make clear that mere affiliation with a party is not sufficient to confer party status. Thus, in *ACLU*, the First Circuit held that a group or individual does not derive standing in its own right merely because of the participation of an organization to which it belongs. In that case, the American Civil Liberties Union (ACLU) had participated in a proceeding before the Federal Communications Commission, and the court held that two of the ACLU's local affiliates did not thereby derive standing. The court noted (774 F.2d at 26 (citations omitted)) that "[h]ad [the affiliates] wished to participate in the proceedings or review process as individual parties, they could have filed comments with the agency or petitioned for reconsideration of the FCC's final order. Failure to do either precludes them from petitioning for review of that order." Similarly, in *Clark & Reid Co.* v. *United States*, 804 F.2d 3 (1st Cir. 1986), a member of a motor carrier rate bureau sought judicial review of an ICC order. The court held that the litigant lacked standing to seek review because it had not

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[3] This Court's decision in *American Trucking Ass'ns* v. *United States*, 355 U.S. 141 (1957), relied upon by petitioner (Pet. 10), is inapposite. As petitioner concedes (*ibid.*), that case simply stands for the proposition that RLEA would have had standing to seek review "as the representative of [affected] employees," a proposition that we do not dispute. Similarly, there is no merit in petitioner's claim (Pet. 10-11) that because RLEA is an umbrella organization, the individual members must each be treated as parties as well. Such a conclusion would plainly do violence to the statutory language, and petitioner cites nothing in the legislative history to support such a result.

participated in its own right before the agency (*id.* at 5-7). It noted (*id.* at 6) that "[a]llowing an appeal to be brought by an organization's member that did not participate actively in the agency proceedings would allow a membership organization to search for and select a forum in which it is most likely to obtain a favorable result. It need only select as petitioner a member who has venue in the desired circuit."[4] *ACLU* and *Clark* thus directly support the court of appeals' decision here.

Third, petitioner contends (Pet. 7-10) that the limitation on judicial review should not apply when the party below chooses not to seek review and another interested person, who was not a party below, seeks to do so. It cites an observation in *ACLU* (774 F.2d at 26) to the effect that the entities there denied standing had not claimed that the party which had sought judicial review was unable to protect their interests (Pet. 8-9). But that observation falls far short of a holding that non-parties *would* have standing if their interests were not protected. And petitioner cites no case that has so held.[5] Nor is there a basis for such a holding in the language or history of Section 2344.

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[4] The court found that a second petitioner, which *was* a participant before the ICC, had filed suit in the wrong circuit. Accordingly, the court transferred the case to the District of Columbia Circuit (804 F.2d at 6-7).

[5] In addition to *ACLU*, petitioner relies on language in *Gage* v. *AEC*, 479 F.2d 1214 (D.C. Cir. 1973). In *Gage*, the court stated (*id.* at 1221 n.23) that "[i]t is arguable that if no adequate alternative remedies appeared and if their failure to join as 'parties' to the rulemaking was justifiable," the entities "could bring an action for 'direct' review." The court cited the following example: "[I]f one party had been entrusted to represent petitioners' interests but had, after promulgation, 'dropped the cudgel,' they might be entitled to petition for review" (*ibid.* (citing *Easton Utilities Comm'n* v. *AEC*, 424 F.2d

Finally, petitioner contends (Pet. 5) that the court of appeals' decision will burden the administrative process with a "multiplicity of redundant appearances, pleadings, and testimony," because it will reduce the incentive for individuals with common interests to band together and protect those interests. But the prior cases under Section 2344, upon which the court of appeals here relied, have led to no such difficulties. Individual employees will still find it convenient and effective to speak with a single voice in ICC proceedings. In the unusual case where an individual employee or union has a particularly strong position on a subject (or a position divergent from that of its umbrella organization), it can protect its appellate rights by intervening in the ICC proceeding. The argument that this requirement will create administrative difficulties is simply unfounded.

In any event, even if petitioner's concern about administrative difficulties were correct, that would not entitle a court to rewrite Section 2344. If such a problem exists, it is one for Congress, not the courts, to correct.

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847, 853 (D.C. Cir. 1970)). The language in *Gage*, however, hardly demonstrates a conflict among the circuits. The court simply noted in dictum that there is an "arguable" basis for the claim that review "might" be available.

In the *Easton* case (cited in *Gage*), Easton Utilities Commission (EUC), which did not participate before the Atomic Energy Commission (AEC), was *not* permitted to pick up the cudgel from the City of Dover, which did participate at the AEC but chose not to seek review. EUC had argued that *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953), and *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.), cert. denied, 323 U.S. 777 (1944), authorized it to seek judicial review. The court in *Easton*, however, found those cases distinguishable because (1) there was a clear relationship between the party and the intervenor in both cases and (2) neither case "involved intervention in an administrative proceeding but rather * * * both arose under and were governed by the Federal Rules of Civil Procedure" (424 F.2d at 853). The latter distinction is critical in the present case. In contrast to Section 2344, Fed. R. Civ. P. 24(a) permits intervention where representation by existing parties is inadequate to preserve rights that cannot otherwise be protected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

ROBERT S. BURK
*General Counsel*
*Interstate Commerce Commission*

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